AmBank (M) Bhd v Metroplex Sdn Bhd (provisional liquidators appointed)

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22 NCC-77 OF 2010
MAH WENG KWAI JC
4 APRIL 2011

Civil Procedure — Summary judgment — Application for — Recovery of monies outstanding — Whether there were triable issues — Agreement for guarantee facility ('AGF') — Whether AGF clothed plaintiff with right to commence legal proceedings against defendant to recover monies due and owing to each of guarantors — Failure to plead change of plaintiff's principals — Whether occasioned prejudice to defendant — Whether plaintiff's action time barred — Whether defendant ought to be notified of amount due and owing to each guarantor — Whether not a plain and obvious case for summary judgment

The plaintiff commenced legal action against the defendant for the recovery of monies owing under the agreement for guarantee facility ('AGF'). The brief facts of this case are as follows. In 1995, the defendant issued RM310m nominal value redeemable bonds and guaranteed bonds ('the bonds') and up to 156,241,996 detachable warrants carrying transferable subscription rights in the defendant ('the warrants'). To facilitate the implementation of the issue of the bonds and the warrants, the defendant, as the obligor, entered into the AGF with: (a) Arab-Malaysian Merchant Bank Bhd ('AMMB') as agent and arranger; (b) Aseambankers Malaysia Bhd ('Aseambankers') as Joint Arranger and Security Trustee; and (c) nine financial institutions known as 'guarantors'. AMMB was appointed the agent while aseambankers was appointed as the security trustee for the guarantors respectively. Pursuant to the AGF, the guarantors agreed to furnish a guarantee of up to RM317,750,000 in favour of BHLB Trustee Bhd ('BTB'), as security for the payment of the principal and interest under the bonds ('the guarantee'). Subsequently, the defendant entered into a deed of trust with BTB where the latter undertook to repay the principal and interests on the bonds, to be guaranteed by banks and financial institutions acceptable to BTB, to the plaintiff. Five years later AMMB notified the defendant that a demand had been made on the guarantee by BTB as there was an event of default under the bonds and thus requested the defendant to pay the sum of RM292,132,925.40 (being the guaranteed sum of RM317,750,000 less the sinking fund amount of RM25,213,649.94) to AMMB. To meet the demand of BTB, AMMB paid the sum of RM317,346,575.34 to BTB. AMMB requested the defendant to repay the sum of RM292,132,925.40 together with interest at the agreed rate. AMMB changed its name twice, namely on 14 June 2000 from AMMB to Am

Merchant Bank Bhd ('Am Merchant') and on 4 December 2006 from Am Merchant to Am Investment Bank Bhd ('Am Investment'). On 7 April 2008, pursuant to a business transfer agreement, Am Investment vested all its rights and liabilities in the plaintiff. As the defendant had failed and/or refused to repay the said sum, the plaintiff filed this action as agent of all the guarantors against the defendant. By a summons in chambers ('encl 3') the plaintiff sought to enter summary judgment against the defendant. In opposing the plaintiff's application for summary judgment, the defendant raised the following issues as being triable issues: (i) whether the plaintiff can be an agent and has the right to commence this action; (ii) failure to plead the change of the plaintiff's principals; (iii) whether the plaintiff's action was time barred; and (iv) alleged debt and default interest.

Held, dismissing the plaintiff's application with costs:

(1) The plaintiff had the locus standi to bring this action. This was because the word 'person' in s 135 Contracts Act 1950 ('CA') includes 'a body of persons, corporate or unincorporated' under s 3 of the Interpretation Acts 1948 and 1967. While ss 136 and 137 CA provide for situations where a natural person is appointed as an agent, the sections do not exclude a corporation from being appointed an agent under the CA. Further, there is nothing in common law which precludes a corporation from being appointed an agent (see s 1(2) of the CA and s 3 of the Civil Law Act 1953). The guarantors which were all corporations have the capacity or locus to appoint the plaintiff as their agent to sue. Further, cll 18.2 and 18.4 of the AGF had clothed the plaintiff with the right to commence legal proceedings against the defendant for the recovery of monies due and owing to each of the guarantors (see paras 21–25).

(2) The change of the plaintiff's principals was not a material fact to the plaintiff's cause of action. The plaintiff's cause of action was premised on the debt due and owing by the defendant under the AGF. In any event, the change of principals was by operation of law due to the several statutory vesting orders under s 50 of the Banking and Financial Institutions Act 1989. No prejudice had been occasioned to the defendant by the change of principals as there has been no change in the quantum of debt owing by the defendant to the said principals. The change of principals was a matter of evidence and the omission to plead it is not in breach of O 18 r 7 of the Rules of the High Court 1980 (see para 31).

(3) In so far as the limitation issue was concerned, it was a triable issue. Whether or not the cause of action had accrued on the date of the first notice of demand or on the date of the plaintiff's solicitors' letter of demand, was a matter to be tried. Evidence would have to be adduced by the plaintiff to determine the meaning of 'accrual of cause of action' in

this case. The plaintiff's solicitors' letter of demand may not necessarily have caused time to restart running. Further, whether the plaintiff could show that limitation has not set in by virtue of the letter of demand and/or the restraining effect of the restraining order and/or the several alleged acknowledgments of debt by the defendant was a triable issue (see para 35).

(4) As the loans were several, the defendant ought to have been notified how much was allegedly due and owing to each guarantor. The defendant was not notified of the principal sum nor the calculation of interest due. In fact, the guarantors had never demanded for the payment of interest. To the extent that the defendant did not know how much principal and interest sums were due and payable to each individual guarantor, the plaintiff's certificate of indebtedness would not be said to be conclusive of the defendant's indebtedness to each guarantor (see paras 45–46).

[Bahasa Malaysia summary

Plaintif memulakan tindakan undang-undang terhadap defendan bagi mendapatkan wang yang terhutang di bawah perjanjian kemudahan jaminan ('PKJ'). Fakta ringkas kes ini adalah seperti berikut. Pada tahun 1995, defendan telah menerbitkan nominal bernilai RM310 juta bon boleh tebus dan bon yang dijamin ('bon') dan sehingga 156241996 waran boleh cerai yang menjalankan hak langganan boleh pindah ke atas defendan ('waran'). Untuk memudahkan pelaksanaan pengeluaran bon dan waran, defendan, sebagai penjamin, memasuki ke dalam PKJ dengan: (a) Arab-Malaysian Merchant Bank Bhd ('AMMB') sebagai ejen dan penyusun; (b) Aseambankers Malaysia Bhd ('Aseambankers') sebagai penyusun utama bersama dan pemegang amanah; dan (c) sembilan institusi kewangan yang dikenali sebagai 'penjamin'. AMMB dilantik sebagai ejen manakala Aseambankers telah dilantik sebagai pemegang amanah sekuriti untuk penjamin masing-masing. Menurut PKJ, penjamin telah bersetuju untuk memberikan jaminan sehingga RM317, 750,000 memihak kepada BHLB Trustee Bhd ('BTB'), sebagai jaminan bagi pembayaran pokok dan faedah di bawah bon ('jaminan'). Selepas itu, defendan telah memeterai surat ikatan amanah dengan BTB di mana kedua menjalankan untuk membayar balik prinsipal dan faedah ke atas bon, akan dijamin oleh bank dan institusi kewangan yang diterima oleh BTB, kepada plaintif. Lima tahun kemudian AMMB memberitahu defendan bahawa permintaan telah dibuat atas jaminan oleh BTB terdapat satu peristiwa kemungkiran di bawah bon dan seterusnya meminta defendan untuk membayar sebanyak RM292, 132,925.40 (iaitu jumlah yang dijamin RM317, 750,000 ditolak amaun yang kurang dana sebanyak RM25, 213,649.94) kepada AMMB. Untuk memenuhi permintaan BTB, AMMB membayar sejumlah RM317, 346,575.34 kepada BTB. AMMB meminta defendan untuk membayar balik sebanyak RM292, 132,925.40 bersama faedah pada kadar yang dipersetujui. AMMB menukar namanya dua kali, iaitu pada 14 Jun 2000 daripada AMMB kepada Am

Merchant Bank Bhd ('Am Merchant) dan pada 4 Disember 2006 daripada Am Merchant kepada Am Investment Bank Bhd ('Am Investment'). Pada 7 April 2008, selaras dengan perjanjian pemindahan perniagaan, Am Investment yang meletakkan semua hak dan tanggungan kepada plaintif. Oleh kerana defendan telah gagal dan/atau enggan untuk membayar balik jumlah tersebut, plaintif telah memfailkan tindakan ini sebagai ejen kepada semua penjamin, terhadap defendan. Melalui saman dalam kamar ('lampiran 3') plaintif cuba untuk memasukkan penghakiman terus terhadap defendan. Dalam menentang permohonan plaintif untuk mendapatkan penghakiman terus, defendan membangkitkan isu-isu berikut sebagai sebagai isu-isu yang boleh dibicarakan: (i) sama ada plaintif boleh menjadi ejen dan mempunyai hak untuk memulakan tindakan ini; (ii) kegagalan untuk merayu pertukaran prinsipal plaintif; (iii) sama ada tindakan plaintif adalah dihalang oleh had masa; dan (iv) dakwaan kemungkiran hutang dan faedah.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Plaintif mempunyai *locus standi* untuk membawa tindakan ini. Ini adalah kerana perkataan 'orang' di bawah s 135 Akta Kontrak 1950 ('AK') termasuk 'sebuah badan orang, diperbadankan atau tidak diperbadankan' di bawah s 3 Akta Tafsiran 1948 dan 1967. Walaupun ss 136 and 137 AK memperuntukkan keadaan di mana seseorang secara asalnya dilantik sebagai ejen, seksyen tidak memasukkan perbadanan daripada melantik seorang ejen di bawah AK. Di samping itu, tidak terdapat apa-apa jua dalam *common law* yang menghalang sebuah perbadanan daripada dilantik sebagai ejen (lihat s 1(2) AK dan s 3 Akta Undang-Undang Sivil 1953). Penjamin-penjamin yang semua perbadanan mempunyai keupayaan atau lokus untuk melantik plaintif sebagai ejen untuk mendakwa mereka. Selanjutnya, kll 18.2 dan 18.4 PKJ yang telah memberikan plaintif hak untuk memulakan prosiding undang-undang terhadap defendan bagi mendapatkan wang yang harus dibayar dan terhutang kepada setiap penjamin (lihat perenggan 21–25).

(2) Pertukaran prinsipal plaintif bukanlah satu fakta penting kepada kausa tindakan plaintif. Kausa tindakan plaintif adalah berdasarkan hutang yang kena dibayar dan terhutang oleh defendan di bawah PKJ. Dalam sebarang keadaan, pertukaran prinsipal adalah melalui kuat kuasa undang-undang kerana perintah beberapa perintah di bawah s 50 Akta Bank dan Institusi-Institusi Kewangan 1989. Tiada prejudis telah disebabkan kepada defendan oleh pertukaran prinsipal kerana terdapat sebarang perubahan dalam jumlah hutang yang terhutang oleh defendan kepada prinsipal. Penukaran prinsipal adalah perkara bukti dan peninggalan memplidkannya tidak melanggar A 18 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat prenggan 31).

(3) Setakat isu had, ia adalah satu isu yang perlu dibicarakan. Sama ada atau

tidak kausa tindakan tersebut terakru pada tarikh notis permintaan yang pertama atau pada tarikh surat peguamcara plaintif permintaan, adalah suatu perkara yang perlu dibicarakan. Bukti perlu dikemukakan oleh plaintif untuk menentukan maksud 'akruan kausa tindakan' dalam kes ini. Surat tuntutan peguamcara plaintif tidak semestinya telah menyebabkan masa untuk memulakan berjalan semula. Selanjutnya, sama ada plaintif boleh menunjukkan batasan yang telah tidak ditetapkan menurut surat permintaan dan/atau kesan menghalang perintah menghalang dan/atau pengesahan beberapa hutang yang didakwa oleh defendan sebagai isu yang perlu dibicarakan (lihat perenggan 35).

(4) Oleh kerana terdapat beberapa pinjaman, defendan sepatutnya telah diberitahu berapa banyak yang seharusnya dibayar dan terhutang kepada setiap penjamin. Defendan tidak diberitahu tentang jumlah pokok mahupun pengiraan faedah yang terhutang. Malah, penjamin tidak pernah menuntut untuk pembayaran faedah pinjaman. Setakat mana defendan tidak tahu berapa banyak jumlah wang pokok dan faedah terhutang dan perlu dibayar kepada penjamin setiap, sijil keberhutangan plaintif tidak boleh dikatakan muktamad bagi keterhutangan defendan kepada setiap penjamin (lihat perenggan 45–46).]

Notes

For cases on application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7895–7945.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 1 CLJ(Rep) 69, SC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
UNP Plywood Sdn Bhd v HSBC Bank Malaysia Bhd [2010] 5 MLJ 323, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50
Civil Law Act 1953 s 3
Companies Act 1965 ss 176(10), 226(3)
Contracts Act 1950 ss 1(2), 135, 136, 137
Interpretation Acts 1948 and 1967 s 3
Limitation Act 1953 s 26(2)
Rules of the High Court 1980 O 14, O 18 r 7

EL Chang (CB Loh with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
Wong Rhen Yen (K Goik with him) (Dennis Nik & Wong) for the defendant.

Mah Weng Kwai JC:

[1] The plaintiff's claim is for the sum of RM629,766,301.16 together with interest and costs.

[2] By the summons in chambers (encl 3) the plaintiff sought to enter summary judgment against the defendant.

[3] Upon reading the affidavits and the written submissions and upon hearing counsel for the plaintiff and defendant, the court on 17 January 2011 held that there are issues to be tried in this case and accordingly encl 3 was dismissed with costs of RM3,000.

[4] The defendant was ordered to file its defence within two weeks. Hearing of the case was fixed on 21 February 2011.

[5] The plaintiff being dissatisfied with the decision now appeals to the Court of Appeal against the said decision.

BRIEF FACTS

[6] In 1995 the defendant issued RM310m nominal value redeemable bonds and guaranteed bonds ('the bonds') and up to 156,241,996 detachable warrants carrying transferable subscription rights in the defendant ('the warrants').

[7] To facilitate the implementation of the issue of the bonds and the warrants, the defendant on 29 November 1995 as the obligor entered into an agreement for guarantee facility ('AGF') with:

(a) Arab-Malaysian Merchant Bank Bhd ('AMMB') as agent and arranger;

(b) Aseambankers Malaysia Bhd ('Aseambankers') as joint arranger and security trustee; and

(c) nine financial institutions known as 'guarantors' namely:

(i) Arab-Malaysian Finance Bhd;

(ii) Kwong Yik Bank Bhd;

(iii) The Pacific Bank Bhd;

(iv) Permata Merchant Bank Bhd;

(v) Perwira Affin Bank Bhd;

(vi) Public Bank Bhd;

(vii) Aseambankers;

(viii)Malayan Banking Bhd; and

(ix) AMMB.

AMMB was appointed the agent while Aseambankers was appointed as the security trustee for the guarantors respectively.

[8] Pursuant to the AGF, the guarantors agreed to furnish a guarantee of up to RM317,750,000 in favour of BHLB Trustee Bhd ('BTB'), as security for the payment of the principal and interest under the bonds ('the guarantee').

[9] On 29 November 1995 the defendant entered into an assignment of sinking fund account with Aseambankers as Security Trustee.

[10] The AGF provided for a deed of trust to be entered into by the defendant and a trustee. On 18 December 1995 the defendant entered into a deed of trust with BTB wherein BTB undertook to repay the principal and interests on the bonds, to be guaranteed by banks and financial institutions acceptable to BTB, to the plaintiff.

[11] Five years later, on 21 December 2000, AMMB notified the defendant that a demand had been made on the guarantee by BTB as there was an event of default under the bonds and thus requested the defendant to pay the sum of RM292,132,925.40 (being the guaranteed sum of RM317,750,000 less the sinking fund amount of RM25,213,649.94) to AMMB by 15 January 2001.

[12] To meet the demand of BTB, AMMB paid the sum of RM317,346,575.34 to BTB on 15 January 2001 and on the same day informed the defendant of the said payment. AMMB requested the defendant to repay the sum of RM292,132,925.40 together with interest at the agreed rate.

[13] From 22 October 2002 to 21 October 2004 the defendant obtained a restraining order ('RO') under s 176(10) of the Companies Act 1965.

[14] AMMB changed its name twice, namely on 14 June 2000 from AMMB to Am Merchant Bank Bhd ('Am Merchant') and on 4 December 2006 from Am Merchant to Am Investment Bank Bhd ('Am Investment'). On 7 April 2008, pursuant to a business transfer agreement, Am Investment vested all its rights and liabilities in the plaintiff.

[15] Due to the defendant's failure and/or refusal to repay the plaintiff, the plaintiff instructed its solicitors to issue a letter of demand to the defendant on 25 August 2009.

[16] From 12 October 2009–16 October 2009, the plaintiff obtained letters of authorisation from all the nine guarantors to commence legal action against the defendant for the recovery of monies owing under the AGF. Accordingly, on 15 January 2010 the plaintiff filed this action as agent of all the guarantors against the defendant.

[17] In opposing the plaintiff's application for summary judgment, the defendant essentially raised four issues as being triable issues. I will now deal with each of the issues.

FIRST ISSUE — WHETHER THE PLAINTIFF CAN BE AN AGENT AND HAS THE RIGHT TO COMMENCE THIS ACTION

[18] The defendant contended that the plaintiff, acting as agent for the guarantors cannot be appointed an agent as it is a corporation and therefore beyond the scope of s 135 of the Contracts Act 1950 (CA).

[19] Section 135 of the CA provides for the definition of 'agent' as follows:

> An 'agent' is a *person* employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.

Further, s 136 of the CA states:

> Any *person* who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

and s 137 of the CA sets out who may be an agent. Section 137 reads:

> As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

[20] The defendant contended that the plaintiff is not a 'person' and as such cannot be appointed an agent. And as the guarantors are all corporations they did not have the capacity to appoint the plaintiff as an agent.

[21] I am of the considered view that the plaintiff has the locus standi to bring this action, having been properly appointed by the plaintiff. This is

simply because the word 'person' in s 135 of the CA has been defined to include 'a body of persons, corporate or unincorporated' under s 3 of the Interpretation Acts 1948 and 1967.

[22] While ss 136 and 137 of the CA provide for situations where a natural person is appointed as an agent, the sections do not exclude a corporation from being appointed an agent under the Contracts Act.

[23] Further, there is nothing in common law which precludes a corporation from being appointed an agent (please refer to s 1(2) of the CA and s 3 of the Civil Law Act 1953).

[24] Thus, for the same reason I am of the view that the guarantors which are all corporations, have the capacity or locus to appoint the plaintiff as their agent to sue.

[25] With respect, I cannot agree with counsel for the defendant that ss 135, 136 and 137 of the CA collectively refer to a 'natural person' only. It is not obvious from a reading of the Contracts Act 1950 that Parliament in its wisdom, never intended a corporation not to have the capacity to appoint an agent. If it was the intention of Parliament to exclude a corporation from being able to appoint an agent, it would have expressly stated so.

[26] As the provisions of ss 135, 136 and 137 of the CA read with s 3 of the Interpretation Acts 1948 and 1967, are clear and ascertainable the court must yield to the intention of Parliament. In *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 Steve Shim CJ (Sabah and Sarawak), inter alia, said:

> … The court then cited with approval the observation by Lord Simonds in *Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189 (HL) wherein he said that the duty of the court was to interpret the words of a statute that the legislature had used. it is of course trite law that if the intention of the legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As *Bindra's Interpretation of Statutes*, (8th Ed), has stated:
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> > If the invention of the Legislature can be ascertained all rules of construction must yield to the legislative intention (*Board of Trustees v Johan Steele* [1933] SCC (SC) 47). They cannot override the legislative intent specifically expressed in the enactment (*State of Up v Jaipal Singh Narsh* [1978] All L1 936). If the intention of the legislature is clear, that intention constitutes the law.

The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural

and ordinary sense. The words themselves alone in such case best declare the intent of the law giver (see *Bindra's Interpretation of Statutes* (8th Ed)).

[27] Whether the plaintiff has the right to commence this action on behalf of the guarantors against the defendant depends on the vesting of the AGF from AMMB to the plaintiff. Articles 1, 2, 3 and 7 of the business transfer agreement make it clear that the AGF was vested by AMMB to the plaintiff. Notice of the vesting was given to the defendant vide the notice dated 7 July 2008 (encl 7 – exh AM16) hence, the defendant cannot now claim ignorance of it.

[28] Clause 18.2 of the AGF provides that the plaintiff on the instructions of the majority of the guarantors has the right to require the defendant to satisfy the claim of each of the guarantors under or in connection with the guarantee. And cl 18.4 of the AGF provides that the agent, the plaintiff herein, is entitled 'forthwith to exercise the rights, powers and remedies upon default provided in the security documents …'. Thus, it appears that cl 18.2 and cl 18.4 of the AGF have clothed the plaintiff with the right to commence legal proceedings against the defendant for the recovery of monies due and owing to each of the guarantors.

[29] The ruling of the court on first issue therefore was that the capacity and right of the plaintiff to bring this action is not a triable issue.

SECOND ISSUE — FAILURE TO PLEAD THE CHANGE OF THE PLAINTIFFS PRINCIPALS

[30] The defendant contended that the plaintiff had failed to plead in its statement of claim the 'correct' guarantors who are the principals of the plaintiff. The defendant contended that as the rights and liabilities of some of the guarantors such as Pacific Bank Bhd, Kwong Yik Bank Bhd and Aseambankers Malaysia Bhd as listed in Schedule 1 of the AGF, have been transferred to new entities, the plaintiff ought to have included them in its statement of claim.

[31] On this issue, the court agreed with counsel for the plaintiff that the change of the plaintiffs principals is not a material fact to the plaintiff's cause of action. The plaintiff's cause of action is premised on the debt due and owing by the defendant under the AGF. In any event the change of principals was by operation of law due to the several statutory vesting orders under s 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'). No prejudice has been occasioned to the defendant by the change of principals as there has been no change in the quantum of debt owing by the defendant to the said principals.

The change of principals is a matter of evidence and the omission to plead it is not in breach of O 18 r 7 of the Rules of the High Court 1980.

[32] Second issue was thus held not to be a triable issue as well.

THIRD ISSUE — WHETHER THE PLAINTIFF'S ACTION IS TIME BARRED

[33] The defendant contended that the plaintiff's claim is time barred on the basis that the plaintiff had made a demand for the repayment of the sum of RM317,346,575.34 on 15 January 2001 (the plaintiff's first affidavit — encl 4 – exh AM9). As there was no repayment made to the plaintiff nor any acknowledgment of debt made by the defendant since 15 January 2001, the last date for the plaintiff to file its action within the six year limitation period, was 14 January 2007. The plaintiff only filed its writ of summons and statement of claim on 15 January 2010, hence it was out of time by three years.

[34] In response to the argument on limitation the plaintiff contended that the demand for repayment was made by its solicitors on 18 January 2007 (the plaintiff's second affidavit — encl 7 – exh AM31) and that as the defendant had obtained a RO under s 176(10) of the Companies Act 1965 the plaintiff was restrained from commencing action against the defendant. The plaintiff also, contended that it had not exercised its right to declare all monies due and owing under cl 18.2 of the AGF and that the cause of action had not accrued when the notice of demand of 15 January 2001 was issued.

[35] I am of the view that in so far as the limitation issue is concerned it is a triable issue. Whether or not the cause of action had accrued on the date of the first notice of demand of 15 January 2001 or on the date of the plaintiff's solicitors' letter of demand of 18 January 2007 to my mind is a matter to be tried. Evidence will have to be adduced by the plaintiff to determine the meaning of 'accrual of cause of action' in this case. The plaintiff's solicitors' letter of demand may not necessarily have caused time to restart running.

[36] On 22 October 2002–21 October 2004 the defendant obtained a RO under s 176(10) of the Companies Act 1965. The plaintiff relied on this to say that the plaintiff was restrained from commencing any action against the defendant. However, I am of the view that the RO did not necessarily restrain the plaintiff from commencing fresh proceedings against the defendant. Except with leave of court, the RO only restrains *further* proceedings, in existing or pending proceedings, against the defendant, and not from commencing fresh proceedings.

[37] Unlike s 226(3) of the Companies Act 1965 which provides that 'no action or proceeding shall be proceeded with or commenced against the Company except by leave of Court', there is no similar prohibition in s 176(10) of the Act. Section 226(3) prohibits any fresh action from being commenced or proceeded with save with leave of court, where the company is under liquidation whereas s 176(10) restrains a continuance of proceedings which have already been commenced. As such the plaintiff cannot rely on the operation of the RO as a ground to enlarge time. Taking for a moment that the RO did in fact and in law prohibit the plaintiff from commencing an action against the plaintiff, the plaintiff could have applied for leave of court to file proceedings. This the plaintiff did not do. The RO did not stop time from running neither did it cause a fresh accrual of cause of action in this case.

[38] The plaintiff further contended that limitation does not arise as the defendant had acknowledged the debt from time to time in 2002, 2005, 2007 and 2008 through the concept paper on the proposed debt restructuring (encl 7 – exh AM25), general announcements on Bursa Malaysia Bhd (exhs AM26, 28 and 29), letter regarding the proposed bilateral arrangement (exh AM27), the defendant's annual report (exh AM30) and the defendant's directors' report and audited financial statements (exh AM22).

[39] While it is not disputed that various statements were made by the defendant in the several exhibits referred to, what is in dispute is whether those statements amount to an unequivocal admission of debt by the defendant. Again, evidence will have to be adduced by the plaintiff to determine the meaning and effect of each of the alleged acknowledgments of debt by the defendant and whether the provisions of s 26(2) of the Limitation Act 1953 can come to the aid of the plaintiff. Section 26(2) of the Limitation Act provides:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
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> Provided that a payment of part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[40] Further, I am of the view that the plaintiff cannot rely on the auditors' report to bind the defendant as it is trite that auditors are not agents of the company. In *Venkob Rao's Law of Agency* (3rd Ed), (Butterworth) it was stated that 'auditors are not agents of the company whose accounts they audit for the purpose of making an acknowledgment saving limitation'.

[41] Based on established authorities the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. And in the Supreme Court case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 1 CLJ(Rep) 69, Hashim Yeop A Sani CJ (Malaya) had this to say on the law of limitation:

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
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> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the State there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[42] At the end of the day, whether the plaintiff can show that limitation has not set in by virtue of the letter of demand dated 18 January 2007 and/or the restraining effect of the RO and/or the several alleged acknowledgments of debt by the defendant is a triable issue.

FOURTH ISSUE — ALLEGED DEBT AND DEFAULT INTEREST

[43] The plaintiff's claim is for the sum of RM629,766,301.16, of which the sum of RM337,113,392.17 is alleged to be interest due and owing by the defendant to the guarantors. However, the plaintiff has failed to give particulars of the interest sums due.

[44] In para 3 of the plaintiff's letter (encl 4 at p 212 — exh AM6) the plaintiff claimed interest at the rate of 1% above the guarantee fee rate and the bank's cost of funds. This claim *appears* to be in breach of the agreed rate stipulated in the interpretation clause for 'Default Rate, Effective Cost of Funds and Prescribed Rate'.

[45] As the loans were several, the defendant ought to have been notified how much was allegedly due and owing to *each* guarantor. The defendant was not notified of the principal sum nor the calculation of interest due. In fact, the guarantors had never demanded for the payment of interest.

[46] The plaintiff argued that the defendant's contention has no basis as the interest claimed by the plaintiff at 13.5%pa was agreed upon by the defendant in the AGF (in particular in cl 1.1 of the AGF) which sets out the prescribed rate and the default rate. The plaintiff also contended that as the defendant had

failed to adduce any evidence to disprove the plaintiff's claim and in the absence of any manifest error, the plaintiff's certificate of indebtedness (encl 4 — exh AM12) is conclusive evidence of the defendant's indebtedness. The plaintiff further argued that the plaintiff is not guilty of any breach of cl 18 of the AGF and that there is no requirement for the plaintiff to particularise the actual amount of the principal sum and interest due to each guarantor.

[47] I am of the view that the defendant has successfully shown that fourth issue is indeed a triable issue. My reasons for arriving at this conclusion are as follows:

(a) there is no averment in the plaintiff's statement of claim or in the affidavit in support to show that the defendant had received any demand from *each* individual guarantor stating the principal and interest sums due respectively;

(b) the defendant has the right under cll 8.2 and 8.3 of the AGF to pay *each* individual guarantor separately;

(c) by not being informed of the exact amount of principal and interest sums due and owing to *each* individual guarantor separately, the defendant was not in a position to know and to pay *each* guarantor separately as and when the sums became due and payable;

(d) pursuant to cl 8 of AGF, the defendant was obliged to pay *each* individual guarantor as and when the sums were due but was not obliged to pay *all* the guarantors in full at the same time;

(e) the plaintiff had unilaterally deducted the sum of RM25,213,649.94 being the sinking fund, in one lump sum from the amount claimed against the defendant in its letter of demand dated 15 January 2001. By deducting the sinking fund in one lump sum, the defendant was not in a position to know how much of it was credited to the account of each individual guarantor;

(f) to the extent that the defendant did not know how much principal and interest sums were due and payable to each individual guarantor, the plaintiff's certificate of indebtedness cannot be said to be conclusive of the defendant's indebtedness to *each* guarantor.

[48] In the Court of Appeal case of *UNP Plywood Sdn Bhd v HSBC Bank Malaysia Bhd* [2010] 5 MLJ 323 it was said that 'the summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant, without a trial when there is no dispute as to the facts and law'. Here, in the present case

there are disputes as to facts and law on at least two issues raised by the defendant. Thus, the summary judgment procedure is not suitable for judgment to be entered.

[49] On the scope and applicability of O 14 proceedings, it will be useful to recall what Gunn Chit Tuan SCJ (as he then was) said in the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 in his dissenting judgment. His Lordship said and I quote:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or incontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. O 14 is not intended to shut out a defendant.
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> The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Pehis Sdn Bhd* [1987] 2 MLJ 332). It was held in the *well-known House of Lords* case of *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash* (1889) 5 TLR 271).

[50] In the result, the summons in chambers for summary judgment was dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed